Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
FEB 24 2006
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY CLERK

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	**CAUSE NO. A 05 CA 334 SS**
	§	
FULBRIGHT & JAWORSKI, LLP,	§	
	§	
Defendant.	§	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE THE TESTIMONY OF JAMES E. MALACKOWSKI

TO THE HONORABLE JUDGE SPARKS:

Plaintiffs file their response to Defendant's Motion to Exclude the Testimony of James E. Malackowski. In its order dated February 13, 2006, the Court decided to carry the Motion to Exclude Malackowski's testimony until trial. Furthermore, the Court ordered that both parties may supplement their filings until the docket call on March 31, 2006. Because Plaintiffs have not yet had the opportunity to depose Defendant's damages expert, this Response is necessarily cursory at this time, but it will be fully supplemented after Plaintiffs have had a chance to take that deposition. Therefore, Plaintiffs reserve their right to supplement this Response. In support of their Response to Defendant's Motion to Exclude, Plaintiffs would respectfully show the Court as follows:

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I. INTRODUCTION

This is legal malpractice action brought by Plaintiffs, Immunocept, LLC, Patrice Anne Lee, and James Reese Matson against Defendant, Fulbright and Jaworski ("Fulbright"), for Fulbright's failures related to a patent Fulbright applied for on behalf of Plaintiffs. Fulbright has filed a motion to exclude the testimony of Plaintiffs' damages expert, James E. Malackowski ("Malackowski") on the basis that his damages testimony is unreliable. Fulbright's motion should be denied because Malackowski's testimony is reliable and thus admissible under the applicable rules of evidence and federal case law. Accordingly, Fulbright's Motion to Exclude should be denied.

II. MALACKOWSKI'S TESTIMONY

Malackowski was designated by Plaintiffs to be their testifying expert regarding the damages that they suffered as a result of Fulbright's negligence. He was asked to analyze certain accounting, financial, marketing, and other business data to form opinions regarding the estimated value of Plaintiff's company and the Patent at issue in this case. Expert Report Of James E. Malackowski ("Malackowski Report") at 3, a true and correct copy of which is attached to **Exhibit A** as **Exhibit 1**.[1] He formed his opinions based on (1) his review of various expert reports, including those of Dr. Bellomo, Alan MacPherson, Dr. Matson, John Kellum, John Kirk, David Tweardy, Keith Ugone, and Philip Phillips; (2) various documents produced during discovery; (3) depositions including those of Marc Delflache, Sarah Brashears, Dr. Findlay, Dr. Matson, Patrice Lee, Douglas Kylander, David Radunsky and Harold Walder; (4) various publicly available information regarding sepsis, Immunocept, Johnson & Johnson, other

[1] **Exhibit A** is an affidavit that Exhibits 1 and 2 are true and correct copies.

companies, RoyaltySource licensing database, and other various financial databases; (5) Johnson & Johnson due diligence materials and analysis; and (6) his application of AICPA Rules 101, 102, 201, 202, 203 and 301. *Id.* at 3-4, 23 & 55; Errata Sheet To The Expert Report And Supporting Analyses Of James E. Malackowski, Dated December 19, 2005 ("Errata") at 1, a true and correct copy of which is attached hereto to **Exhibit A** as **Exhibit 2**. Malackowski's opinion is that Plaintiff's damage is $17.0-$50.7 million for the Patent (after accounting for the residual) and $46.4-$145.0 million for the Business as of April 2002, and $20.4-$60.8 million for the Patent (after accounting for the residual) and $55.7-$174.0 million for the Business as of January 2006. Errata at 1.

III.
ARGUMENT AND AUTHORITIES

A court may admit expert testimony if (1) the expert is qualified, (2) the evidence is relevant, and (3) the evidence is reliable. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 988-89 (5th Cir. 1997). Here, neither Malackowski's qualifications nor the relevance of his testimony are challenged by Defendant. Malackowski is President and CEO of Ocean Tomo LLC, an "integrated intellectual capital merchant banc [that] provide[s] valuation, asset and risk management, corporate finance[,] and expert services." Malackowski Report at 1. Malackowski is internationally recognized in the intellectual capital equity management field and is also an expert in business and intellectual property valuation. *Id.* Malackowski's full curriculum vitae is attached to his report. Furthermore, the relevance of Malackowski's testimony is not contested because his testimony goes to the issue of damages caused by Fulbright's negligence, and because it has a tendency to show the existence a material fact, i.e. damages, to be more probable, his testimony is relevant and thus admissible. *See* FED. R. EVID. 401 & 402.

The dispute here is whether Malackowski's testimony is reliable. A court should allow the testimony of an expert if it is reliable. *Kumho Tire*, 526 U.S. at 149; *Daubert v. Merrell Dow Pharms. Inc.* 509 U.S. 579, 592-92 (1993). "Evidentiary reliability, or trustworthiness, is demonstrated by a showing that the knowledge offered is more than speculative belief or unsupported speculation. Certainty is not required, but the knowledge asserted must be based on good grounds." *U.S. v. Posado*, 57 F.3d 428, 433 (5th Cir. 1995) (quotations omitted). The focus on the reliability inquiry is to be on the method by which the conclusions are reached – not the conclusions themselves. *Daubert*, 509 U.S. at 595; *Watkins*, 121 F.3d at 989. "Instead, [the court] must review only the reasonableness of the expert's use of such an approach, together with his particular method of analyzing the data so obtained, to draw a conclusion regarding the specific matter to which the expert testimony is directly relevant." *Heller Healthcare Fin., Inc. v. Boyes*, No. Civ.A. 300CV1335D, 2002 WL 1558340 at *12 (N.D. Tex. July 15, 2002) (citing *Kumho*, 526 U.S. at 152 and *Watkins*, 121 F.3d at 989). Challenges to the bases and sources of an expert's opinion go to the weight that a jury should give the opinion – not the admissibility of the opinion. *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987).

For the expert's testimony to be considered reliable (1) the expert's testimony must be based on sufficient facts or data, (2) the expert's testimony must be the product of reliable principles and methods, and (3) the expert must apply the principles and methods reliably to the facts of the case. FED. R. EVID. 702. The Court should allow Malackowski's testimony because, as shown in Part II above, he had sufficient facts and data in order to form a reliable opinion; Malackowski's opinion is based his analysis of those facts and data and on AICPA Professional

Standards; and he has reliably applied those principles and methods to the facts in this case to arrive at a reasonably certain damages calculation.

IV.
CONCLUSION

For the reasons stated above, and the reasons to be stated in Plaintiffs Supplemental Response to Defendants Motion to Exclude that will be filed after Plaintiffs have had the opportunity to depose Defendant's damages excerpt, the testimony of Plaintiffs' damages expert, Malackowski, is reliable and thus admissible. Thus, Plaintiffs should be allowed to present Malackowski's testimony at trial. Therefore, Plaintiffs respectfully request that Defendant's Motion to Exclude the Testimony of James E. Malackowski be denied.

DATE: February 21, 2006

Respectfully submitted,

Michael P. Lynn, P.C.
State Bar No. 12738500
Jeffrey M. Tillotson, P.C.
State Bar No. 20039200
John Volney
State Bar No. 24003118
Jeremy A. Fielding
State Bar No. 24040895
LYNN TILLOTSON & PINKER, LLP
750 N. St. Paul Street, Suite 1400
Dallas, Texas 75201
(214) 981-3800 Telephone
(214) 981-3839 Facsimile

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Notice of Document/Attachment(s) Not Imaged but Stored with Document in Case File

See Original File to View/Copy Document/Attachment(s)

Civil Case No. A:05-CA-334 SS

Immunocept, LLC et al.

VS.

Fulbright & Jaworski LLP

Attachments to Document #: 59

Description: Plaintiffs' Response to Defendant's Motion to Exclude the Testimony of James E. Malackowski

File Date: February 24, 2006

Prepared by: dm

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